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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re M. S., a Person Coming Under the Juvenile
Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

M. S.,

Defendant and Appellant.

F058637

(Super. Ct. No. 51170)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Linda A. McFadden, Judge.

Carol L. Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Stephen G. Herndon and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Ardaiz, P.J., Levy, J. and Gomes, J.

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M.S., a juvenile, appeals from a sustained juvenile wardship petition. She contends that the juvenile court erred by failing to address whether she was suitable for deferred entry of judgment (DEJ). For the following reasons, we reverse and remand to the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2009, at approximately 1:00 p.m., appellant and a co-defendant entered a residence in Turlock and stole a game console, jewelry, prescription pills, and a dachshund puppy.

On July 24, 2009, the Stanislaus County District Attorney filed a juvenile wardship petition alleging that appellant came within the provisions of Welfare and Institutions Code section 602, subdivision (a),¹ in that she committed first degree burglary (Pen. Code, §§ 459 & 460, subd. (a); count 1) and conspired to commit first degree robbery (Pen. Code, §§ 182 & 459; count 2). On the same date, the prosecution filed notice that appellant was eligible for DEJ on form JV-750. The prosecution, however, did not attach the JV-751 form giving appellant written notification and a full description of the procedures for DEJ as required by section 791, subdivision (a).

On July 27, 2009, while represented by counsel, appellant denied the allegations in the petition.

On July 26, 2009, around 11:00 p.m., appellant got into a fight with her mother. At one point, appellant grabbed her mother's arm and bit it, leaving a welt. She also scratched her mother's left wrist.

On July 28, 2009, the district attorney filed a second juvenile wardship petition (§ 602, subd. (a)) alleging that appellant committed misdemeanor battery (Pen. Code,

¹ All further section citations are to the Welfare and Institutions Code, unless otherwise stated.

§ 242). No new or additional notifications related to DEJ were filed. On July 29, 2009, appellant denied the allegation.

Pursuant to a negotiated plea bargain, on August 6, 2009, appellant admitted the first degree burglary allegation in the first petition. In exchange, the district attorney moved to dismiss the remaining count in the first petition and the entire second petition. The court granted the motion.

On September 21, 2009, appellant was adjudged and declared a ward of the court. The juvenile court set appellant's maximum period of confinement at 72 months and committed her to juvenile hall for 57 days with 57 days credit. Appellant was placed on probation and released to the custody of placement personnel subject to terms the court prescribed.

On September 29, 2009, appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends that the juvenile court erred by failing to address whether she was suitable for DEJ. The People argue that the juvenile court did not have a duty to determine whether appellant was suitable for DEJ because appellant did not consent to DEJ since she initially denied the allegations and subsequently admitted to one count. Appellant responds that the circumstances in this case do not indicate that she did not consent to DEJ since she was not provided with the required admonishments set forth in section 791. We conclude that the trial court should have addressed whether appellant was entitled to DEJ.

“The DEJ provisions of *section 790 et seq.* were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a *section 602* petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive

recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. [Citations.]” (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558, italics added.)

The determination of whether to grant DEJ requires consideration of “two distinct essential elements of the [DEJ] program,” which are “*eligibility*” and “*suitability*.” (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 607, fn. 10, italics in original.) The eligibility requirements for DEJ are set forth in section 790 and are not at issue in this case.

Section 790, subdivision (b) provides that “[i]f the minor is found eligible for deferred entry of judgment, the prosecuting attorney shall file a declaration in writing with the court or state for the record the grounds upon which the determination is based, and shall make this information available to the minor and his or her attorney.” Section 791 also provides several other notifications that must be provided to a minor, including “[a] full description of the procedures for deferred entry of judgment” (§ 791, subd. (a)(1).) and “[a] clear statement that, in lieu of jurisdictional and disposition hearings, the court may grant a deferred entry of judgment with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment” (§ 791, subd. (a)(3).)

The suitability of a minor for DEJ is determined by the juvenile court in a hearing. “Upon a finding that the minor is also suitable for deferred entry of judgment and would benefit from education, treatment, and rehabilitation efforts, the court may grant deferred entry of judgment. Under this procedure, the court may set the hearing for deferred entry of judgment at the initial appearance The court shall make findings on the record that a minor is appropriate for deferred entry of judgment pursuant to this article in any case where deferred entry of judgment is granted.” (§ 790, subd. (b).) “The court is not required to ultimately grant DEJ, but is required to at least follow specified procedures and exercise discretion to reach a final determination once the mandatory threshold

eligibility determination is made. [Citation.]” (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.)

Here, the prosecution provided written notification that appellant was eligible for DEJ but did not provide the notifications required by section 791. The juvenile court did not hold a suitability hearing. The People contend that these errors are harmless because appellant effectively had not consented to DEJ when appellant initially denied the allegation and admitted only one of the allegations in the first petition. In support of this argument, the People cite *In re Kenneth J.* (2008) 158 Cal.App.4th 973 (*Kenneth J.*) and *In re Usef S.* (2008) 160 Cal.App.4th 276 (*Usef S.*). We conclude that those cases are distinguishable.

In both *Kenneth J.* and *Usef S.*, the prosecuting attorneys found the minors were eligible for DEJ, the minors received notice of those determinations, but the minors denied the allegations of the wardship petitions and requested contested jurisdictional hearings. (*Kenneth J.*, *supra*, 158 Cal.App.4th at pp. 976-978; *Usef S.*, *supra*, 160 Cal.App.4th at pp. 281-283.) *Kenneth J.* held the juvenile court was not required to conduct a suitability hearing for a minor “who is advised of his DEJ eligibility, who does not admit the charges in the petition or waive a jurisdictional hearing, and who does not show the least interest in probation, but who insists on a jurisdictional hearing in order to contest the charges.” (*Kenneth J.*, *supra*, 158 Cal.App.4th at pp. 979-980.) *Kenneth J.* found the minor’s actions “were tantamount to a rejection of DEJ.” (*Id.* at p. 980.) *Usef S.* similarly held the minor “effectively rejected DEJ consideration when he denied the allegations against him and insisted on a contested jurisdictional hearing.” (*Usef S.*, *supra*, 160 Cal.App.4th at p. 286, fn. 3.)

In this case, however, appellant was not provided the notice that she was entitled to receive under section 791. Thus, we cannot conclude that appellant effectively rejected DEJ. It is possible that, if appellant was fully informed of the DEJ procedures, she would have decided to accept DEJ instead of denying the allegations. We also reject

the People's assertion that "it should be presumed that the prosecutor informed appellant" about the notification requirements in section 791 or that "the public defender who represented appellant likely told appellant all about DEJ before she entered denials on appellant's behalf." Section 791 provides mandatory and explicit requirements that a prosecutor must include in written notifications to a minor in appellant's situation. By its plain language, section 791 imposes this burden upon the prosecution. Nothing in the record indicates that the prosecution provided the required written notifications. Thus, the prosecution has not demonstrated that it met its burden in this case and must suffer the consequences for failing to do so.

DISPOSITION

The juvenile court's jurisdiction and disposition orders are reversed. The matter is remanded to the juvenile court for exercise of its discretion to determine, in view of the requirements set forth in Welfare and Institutions Code section 790 *et seq.* and California Rules of Court, rule 5.800, whether appellant should be granted deferred entry of judgment, provided appellant admits the allegations of the petition. Should appellant not admit the petition's allegations, or should the juvenile court, in its discretion, determine that deferred entry of judgment should not be granted, the court's jurisdiction and disposition orders are to be reinstated.